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IN THE

Supreme Court of the United States

October Term, 1948

No. 27.

Bruce's Juices, Inc., a Corporation, *Petitioner*,

v.

American Can Company, a Corporation, *Respondent*.

On Certiorari to the Supreme Court of the State of Florida.

REPLY TO RESPONDENT'S SUPPLEMENTARY BRIEF OF BRUCE'S JUICES, INC., PETITIONER.

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REPLY TO RESPONDENT'S SUPPLEMENTARY BRIEF BY BRUCE'S JUICES, INC., PETITIONER.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondent, American Can, has just filed with this Court "a supplementary brief." This document, instead of being an addendum to, is a restatement of, its previous argument. In general the position taken and the propositions advanced are those which were put forward at the last term. The only material departures are that the revised

argument strays ever further from the case which was argued in the Florida courts, and that reliance is now placed far less upon the law and more upon public policy than before. This reply brief, accordingly, is limited to a consideration of these revised lines of argument. The infirmities of the general argument put forward by American Can have been pointed out in our Reply Brief, and respondent's supplementary brief does nothing to cure or to correct them.

ILLEGALITY IS DIRECT NOT COLLATERAL.

In the course of this litigation American Can has repeatedly attempted to draw a wedge between the Sherman and the Robinson-Patman Acts. It has thus sought to make a plea allowable under the former, inadmissible under the latter. In this attempt it has put forward—and has abandoned—a number of distinct arguments. The trial court attempted to distinguish between *malum in se* and *malum prohibita*.[1] At the hearing a year ago, it was argued by American Can that the Robinson-Patman Act creates new rights and that the remedies set forth in the statute against the offenses enumerated are exclusive. It is now argued that, whereas under the Sherman Act, illegality may reside in a single transaction, it takes two transactions to demonstrate the "discrimination" condemned by the Robinson-Patman Act; and, since the court can look only into the contract between the parties to the suit, the breach of the law is beyond judicial recognition.

No such attempt to drive a wedge between the acts has validity. The antitrust laws have through a long record of interpretation been treated as an entity by this Court. The practices outlawed by the Sherman, the Clayton, and the Robinson-Patman Act all lessen, or tend to lessen, competition and to promote monopoly. The legislative history reveals a constant endeavor of Congress to strengthen the

[1] It is of interest that Sir William Blackstone makes much of such a distinction and that Jeremy Bentham riddles it.

bans on restraint, to add new remedies, to reduce general to specific prohibitions. The Robinson-Patman Act creates no new offense; it specifies forms of restraint which have become serious hazards to the operation of a system of private enterprise. The Congress, in creating new public remedies did not take away any remedy heretofore available to the private party who was injured. An attempt to distinguish in orbit or character between the Sherman and the Robinson-Patman Acts is now played down by American Can, if not abandoned. The latest attempt of respondent is to argue that a challenge of its price-system-in-operation involves a "collateral", and not a "direct", attack.

In its supplementary brief American Can labors to separate the two acts. It is a course of conduct, a price system in operation, a series of transactions with which this case is concerned. American Can attempts to avoid adverse judgment by breaking down its system of price discrimination into separate acts and insulating each from every one of the others. Each in itself and in vacuo is imminent; and since no two can be compared or related—even though the Robinson-Patman Act commands such comparison and relation—there is no available procedure by which it can be judicially condemned.

Thus respondent argues that if a sale had been made to Bruce's Juices on Monday, followed by a separate sale on Friday to a competitor at a lower price, the second sale would not make the first sale illegal. This argument is apparently based on the theory that such sales are entirely separate, and the discrimination in the second sale would not make the first sale retroactively void.[2] We need not

[2] This graphic illustration will not stand analysis. Respondent presents the vendor selling a bill of goods to A on Monday for $100, an equivalent to B on Wednesday for $100, and the like to C on Friday for $90. It is then asked whether the transaction on Friday taints with illegality the transactions consummated on Monday and Wednesday. It is the manner in which the discount is made which creates the illegality. The order in which the sales

discuss this question because it is not in issue here. The pleas of Bruce's Juices do not set forth any such situation. Instead, they charge that American Can deliberately and intentionally followed a scheme and plan to allow the competitors whom it has named in its pleas a discriminatory discount. The sales to Bruce's Juices are charged inseparable from that scheme as it was formulated and carried out. (R. 41-47). They cannot be considered as separate transactions because they were not separate transactions. They were the instruments by which an illegal price policy covering Bruce's Juices and its named competitors was put into effect.

We submit that it is impossible to say that the separate steps, through which a deliberately planned illegal price policy is made effective, are separate and distinct from that illegal price policy.

The Federal question presented here is extremely simple. Bruce's Juices claims that when it is sued in the state court on a transaction which is part of an illegal scheme which discriminates against it, it may plead as a defense the carrying out of the illegal scheme or plan. Certainly this would be true if the transaction were part of a larger plan to violate the Sherman Act. It must be equally true if the

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were made has nothing to do with it. The illustration, however, even on its own unrealistic hypothesis will not stand up; for if the transaction with C is shifted to Monday and that with A and B to Wednesday and Friday, or if the transactions with A, B, and C are continuous, the whole affair takes on a different legal hue. In a retreat, respondent, by giving priority to the transaction at the higher price proclaims its innocence and then insists that it is only the subsequent transaction at the lower price which is discriminatory; but since the person who is its victim is not a party to it, the second contract is subject, not to his "collateral" attack, but only to challenge by the party who enjoys its benefits. (Res. Supp. Br. pp. 8-9). In a word respondent says a contract willfully made to the detriment of a third party is not open to attack by any one who has an interest in challenging it; and the law must in practice operate to the injury of the very party it was meant to serve.

transaction is part of a larger scheme to violate the Robinson-Patman Act. We can see no difference in legal result whether the transaction is part of an attempt to violate the one act or the other.

In respondent's original and supplementary briefs alike much is made of the word "collateral". American Can reiterates that where illegality is not inherent in the transaction the transaction cannot be attacked as unlawful. We agree and have no complaint against the cases cited. They have, however, no application here.

We stand on the proposition that a transaction which is part of the effectuation of an illegal scheme is inherently unlawful. We assert that it is absurd to say that the means used to carry out an illegal plan can be treated as collateral and separate and apart from that plan.

The "Rule" of the Wilder Case.

American Can in support of its "collateral" argument puts its reliance in *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 35 S. Ct. 398 (1915), and its derivative cases. These cases bear undisputed testimony to the existence of a rule against collateral attack. No one of them gives any support to the contention that the plea sought to be interposed by your petitioner involves a collateral, rather than a direct, attack.

The rule invoked by respondent was articulated in the *Wilder* case. There a person who had been sued for debt sought as a defense to plead the illegal existence of the creditor corporation. The Supreme Court, in an opinion by Mr. Chief Justice White, refused to allow the plea. It held that "the rule of general law . . . does not permit the existence of a corporation to be indirectly attacked"; and, since "it is not asserted that, irrespective of the illegal existence of the corporation, the contract of sale was inherently unlawful", it refused to entertain the plea. But the Court was careful not to impair the authority or to re-

strict the orbit of the *Connolly* and the *Continental Wall Paper* cases,[3] which are in point in the pending action. In the instant case, there is no "collateral" attack. Bruce's Juices does not seek to question the legality of the corporate existence of American Can. On the contrary its challenge is direct; it insists that invalidity is inherent in the series of transactions by which the company has discriminated in price to the detriment of Bruce's Juices and to the advantage of its larger competors.

Nor is authority to be found for calling the attack Bruce's Juices is making "collateral" in any decision of this Court in which the *Wilder* case is cited.[4] In *U. S.* v. *Babcock*, 250 U. S. 328, 331, 39 S. Ct. 464, 465 (1919), the *Wilder* case is cited only for the proposition that "where a statute creates a right and provides a special remedy, that remedy is exclusive". The instant case presents no such issue. In *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 593, 41 S. Ct. 209, 210, (1921) it is cited as holding that "the remedies provided by the Anti-Trust Act of 1890 . . . are exclusive". The case involves no question at issue here. In *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.*, 260 U. S. 261, 286, 43 S. Ct. 106, 117, (1922), its use is to support a holding that a suit by private persons for an injunction under the Sherman Act must be brought in a federal, not a state, court. There is no relevancy to the instant case. In *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 252, 45 S. Ct. 300, 302 (1925), it is cited as holding that a contract collateral to that in restraint of trade is not illegal and that the law condemns "only where the validity is inherent in the contract". The rule on collateral attack is here reasserted; but it gives no support to calling "collateral" a contract between the respondent and another

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[3] *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431 (1902); *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 S. Ct. 280 (1909).

[4] *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 37 S. Ct. 718, 723 (1917), hardly needs to be listed, since the *Wilder* case is there cited in a dissenting opinion as "not in point".

party which is the very instrument of price discrimination. In *F. T. C.* v. *Western Meat Co.*, 272 U. S. 554, 559, 47 S. Ct. 175, 177 (1926), the *Wilder* case is plead by counsel seeking a narrow construction of the agency's power. Mr. Justice McReynolds for the Court refuses to allow it to stand in the way of reading the statute "in the light of its general purpose". In *Paramount Famous Lasky Corp.* v. *U. S.*, 282 U. S. 30, 42, 51 S. Ct. 42, 45 (1930), dicta are quoted from the *Wilder* case to the effect that the antitrust laws were "founded upon broad conceptions of public policy" and that "the remedies . . . provided were coextensive with such conceptions". In *U. S.* v. *Cooper Corporation*, 312 U. S. 600, 604, 61 S. Ct. 742, 743 (1941), the *Wilder* opinion is quoted to the effect that the "Sherman Act . . . created new rights and remedies which are available only to those on whom they are conferred by the Act." In *Switchmen's Union of North America* v. *Nat. Mediation Board*, 320 U. S. 297, 301, 64 S. Ct. 95, 97 (1943), it is cited to support the statement that "Congress . . . selected the precise machinery and fashioned the tool which it deemed suitable to that end . . . In such a case the specification of one remedy normally excludes another". The issue before the Court was judicial review of the findings of the National Labor Relations Board; the case was in no wise concerned with the antitrust laws. In *Loughran* v. *Loughran*, 292 U. S. 216, 228, 54 S. Ct. 684, 689 (1934), upon which respondent relies heavily, the *Wilder* case is not even cited. Mr. Justice Brandeis there says, "it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on". He goes on to quote Mr. Justice Holmes to the effect that a "person does not become an outlaw and lose all rights by doing an illegal act". In the instant case there is no question of American Can "becoming an outlaw and losing all rights". In none of these cases is the language quoted open to serious dispute; in none of them is the language quoted relevant to the issue in this litigation. None of these cases supply any sanction for an exception of the general and established rule that the

distinction between the "inherent" and the "collateral" must turn upon relevancy to the issue with which the court is concerned. The issue, quite specific, is not met by the general assertion of respondent that a collateral attack is not to be made; the need is to show that the attack made is collateral.

It is from these citations impossible to discover the doctrine of the *Wilder* case. As the catalogue above indicates, its use is to support a miscellany of statements. Even where cited, it is usually for a purpose other than to invoke the rule against the collateral attack. The case has been cited by this Court only in the instances mentioned and only to support the statements enumerated above. In no single instance has its employment had anything to do with any issue raised by the Robinson-Patman Act. It nowhere gives support to respondent's proposition that in attacking price discrimination as illegal, Bruce's Juices is making a collateral attack.

CREDIT AND THE APPEAL TO POLICY.

An escape from the weakness of American Can's legal position is sought in an appeal to public policy. This Court is urged to overlook the illegality of respondent's price-system lest serious economic consequences ensue. Its judgment must be stayed by "the practical commercial effects" any adverse rule would have. No evidence of disastrous effects is offered; instead a speculative "parade of horrors," quite barren of any supporting data, is set down. (Res. Supp. Br. especially 22-27, 37). It is reiterated that any seller using a quantity discount system could not collect; that cost and complexity would attend the collection of a debt; that all who owe such sellers would be well advised to withhold payment; that the incidence of the ban would fall most heavily upon the little fellow; that the obvious way to meet such a judicial decision would be for the manufacturer not to extend credit. Such statements can be read as a threat of a strike by American Can against its smaller customers if this case is decided against it.

The obvious answer is that the law-abiding corporation has nothing to fear for itself or for its customers. If the same price is made to all alike, there cannot even be a charge of discrimination. If a genuine system of quantity discount is set forth, the seller called upon to justify it has only to present data showing it is firmly established on cost-differences. It is only when the seller sets up an arbitrary system of quantity discount; or when quantity discount is used to mask some other discriminatory practice, such as an arbitrary classification of customers, as in this case, that any legal hazard appears.

Accordingly, the dire consequences threatened by respondent are not inevitable or even probable. If the allowance of the plea sought to be interposed by Bruce's Juices should possibly add complexity and cost to the collection of a debt, the seller can avoid the bother and expense by bringing his price-system into accord with the law's mandate. As the Clayton Act is rewritten by the Robinson-Patman Act, a presumption of illegality is at present set against differences in price to competing customers. And a seller who makes different prices to customers in competition now proceeds at his peril of having to demonstrate in court that the difference is justified by a difference in the cost of manufacture, selling or delivery. In setting up any scheme which favors certain customers at the expense of others, he now assumes an arduous burden of proof. The Congress has taken pains to place serious legal hazards in the way of a departure from the rule of equality; and the seller is well advised to guard his price-structure against the charge of discrimination. The "complexity and expense" of collecting debts which arise out of a series of illegal transactions may well induce the seller to bring his price practices into accord with the law. If he does, the hazard will be removed and no obstacle will stand in the way of his generous extension of credit.

But forces are at hand which, if allowed full play, will capitalize a decision against American Can into a healthier extension of credit. An extension of credit is hardly a

quid pro quo to the customer who must remain a victim of price discrimination. Here the rationale of the Robinson-Patman Act is compelling. Processors of fruit juices must sell in competition at prices made by all the forces which converge in the market. The profit—even the chance of survival—of each of them depends upon the margin between expense and price. The supplier of a producer's good, such as tin containers, by his practice of discrimination, can widen for the favored and narrow for the unfavored this margin between expense and price. The victim of such a "squeeze play" will derive little consolation from the availability of credit in order that he may sit in on a game in which the cards have been stacked in favor of the large corporation with which he must compete. And, when he is driven to the wall, the availability of credit will do him no good.

A famine of credit cannot persist if competition prevails in the industry. Even now a way of escape is open to the smaller processor of fruit juices. He can transfer his patronage from American Can to a smaller manufacturer of tin containers. The stubborn insistence of the giant concern upon going its lawless way will, in fact, provide a business incentive to its smaller competitor to stay within the law. The law-abiding concern, bent upon enlarging its operations, can extend credit without fear of a legal hazard in collection. American Can, then, must follow along the road of living within the law or risk the loss of a large part of its business. Respondent seems to forget that business executives are concerned to serve their own advantage.

Thus in the end the case for American Can comes down to an argument of convenience. Injustice must be tolerated lest a large corporation be forced to mend its ways. The enduring basis upon which sound credit rests is the solvent and expanding operations of the businesses which employ it. Credit has not rested—and does not now rest—upon the immunity of the creditor to the law of the land.

The whole argument on economic policy is based on another assumption which we do not believe can be sus-

tained. The idea appears to be that the Robinson-Patman Act is a difficult and complicated statute and that business men may, in good faith and without a deliberate intention to violate the Act, make a contract which involves discriminatory prices. In that case, counsel for American Can appears to assume that the seller must give away his goods.

Let us assume that a seller brings suit stating that it believes in good faith that the contract prices of the goods are non-discriminatory but that in any event it has no desire to collect prices which the court holds to be discriminatory. Under these circumstances, it submits itself to the jurisdiction of the court and is willing to accept whatever prices, either on a quantum merit or a contract basis, are free from any taint of illegality. It is inconceivable that in such a situation the buyer could say that because the seller made a mistake in good faith it could recover nothing.

This is not the position of American Can here. Its contention is that it may sue for a price which is prima facie discriminatory and deprive the buyer even of the opportunity to prove its case.

ARGUMENT v. ADMISSIONS OF COUNSEL.

In the pre-trial conference in the Circuit Court of Hillsborough County, Florida, the General Counsel of the American Can Company testified that when the Robinson-Patman Act became a law the corporation realized that the discounts which it was giving were in violation of the Act, and the officers of the company set out to devise a system of quantity discounts which could be sustained by proof. They divided its customers into three classes—the largest, Class A, were to receive 5% discount; the second group, Class B, were to receive discounts from 1% to 5%; the third group, Class C, which included all those who purchased less than $500,000 annually, were to receive no discount. He further testified that the actual cost of selling and serving individual purchasers was not considered relevant and that no purchaser through his own

efficiency could escape from the class to which he had been assigned by American Can.

He admitted that this scheme of discounts was prima facie illegal, and that American Can was under obligation to justify it by showing differences in costs under the standards set by the Robinson-Patman Act. (R. 571-578). This is all that petitioner is asking the American Can to do in this case. It is apparently what they expected to do when they devised their plan.

But American Can now takes the position that it is under no obligation to justify its price discount. It claims that it can collect on every contract which is part of its plan without any necessity of rebutting the prima facie illegality of that plan. It asserts that all Bruce's Juices can do is to bring suit for triple damages after it is paid the prices which are the essence of its discriminatory scheme.

But, as we have pointed out in our original brief, a suit for triple damages is a protection only in the unusual case. A canner gradually forced out of business may be unable to show that it might have made a success if it had not been discriminated against. The purpose of the Robinson-Patman Act is to give independent business a chance to succeed.

CONCLUSION.

Finally we point out the economic consequences of permitting American Can to enforce an illegal scheme of price discounts by suing on the particular transactions which are the instruments by which the plan is carried out. This means that every other can company who desires to get the business of the national brands in competition with American Can must give them equivalent discounts. Thus the plan of discounts will inevitably spread. It may be that the costs of enforcing the illegal scheme of discounts may include the settlement of an occasional triple damage suit. But this is a small price to pay for the establishment of a monopoly. The Court may take judicial note that many another monopoly has grown up by this very process, i. e.,

the continued and constant elimination of independents at the price of an occasional triple damage recovery.

The other arguments in the respondent's supplementary brief we think are sufficiently covered in our original brief and in our reply. We only point out here that the respondent's supplementary brief again makes the assumption that there was a trial in the State Court and that at that trial petitioner did not produce sufficient evidence to sustain its defense. Our answer to this does not require restatement. There was no trial. This was not the purpose of the uncompleted testimony taken (R. 37-39), or the basis of the judgment as ordered by the trial Court, (R. 580-582), nor as particularly pointed out in the opinion of the Supreme Court of Florida (R. 594-601, and particularly at p. 600 thereof). The Court there held the defense of illegality unavailable in this litigation, and therefore did not permit petitioner to develop its evidence. If this truncated and incomplete proceeding is to be treated as a trial by the Supreme Court of Florida that in itself deprives us of our defense under the Robinson-Patman Act. Petitioner stands upon its original brief and reply brief as supplemented hereby.

Respectfully submitted,

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